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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-254

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,
Nashville, Tennessee,

Petitioner,

v.

CASTEL VENABLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RESPONSE NOT PRINTED

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, William S. Neil, Warden, Tennessee State Prison, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 30, 1972.

OPINIONS BELOW

The opinion of the Sixth Circuit, ... F.2d ..., not yet reported, is reproduced as Appendix A. The order of the District Court of May 25, 1971, denying the relief sought, is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 30, 1972. This petition for certiorari is timely filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May a defendant with appointed counsel enter a plea of guilty to murder and several years later reopen the question of the voluntariness of that plea on his allegation that his attorney was so inept that to plead guilty was the only choice he had?

2. May a state trial judge at a habeas corpus hearing disbelieve the testimony of the prisoner, who is the only witness, when that testimony is incredible and self-serving? If so, should the Sixth Circuit have respected that finding of fact pursuant to 28 U.S.C. §2254(d)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "(N)or shall any person . . . be deprived of life, liberty, or property, without the process of law . . ."

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent parts:

§2241. *Power to grant writ*

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . .

* * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(3) He is in custody in violation of the Constitution of laws or treaties of the United States . . ."

§2254. *State custody; remedies in Federal courts*

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a

factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such

factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

STATEMENT OF THE CASE

Castel Venable was indicted for first degree murder. An attorney from the Davidson County Public Defender's office was appointed to represent him. He entered a plea of guilty to murder in the second degree on May 3, 1966. Several years later in a habeas corpus petition he alleged his guilty plea should be set aside because the assistant public defender who represented him did not adequately prepare the case, only talked to him a few minutes before the entry of the plea, and was otherwise so inept the only real choice he had was to plead guilty.

After having lost his contentions in the Tennessee state courts[1] Mr. Venable sought federal habeas relief. The

[1] The records of the first State habeas case are filed as Exhibits A-E. The records of the second State habeas case are filed as Exhibits 1-9. The Sixth Circuit clerk has been asked to send all this to the Court.

District Judge denied the relief and the Sixth Circuit in a per curiam opinion reversed and remanded for an evidentiary hearing on the question of assistance of counsel "and for a determination whether appellant is entitled to habeas corpus relief."

The Sixth Circuit opinion at first glance seems to do no more than remand the case to the District Court to give the maligned defense attorney an opportunity to rebut the charges against him. As the Sixth Circuit noted, the record is uncontradicted that the attorney "spoke to [Mr. Venable] for only ten minutes and refused to listen to his version of the shooting or to investigate the surrounding circumstances."

To fully understand the issue presented, it is necessary to consider the history of the case.

1. *The guilty plea and the first State habeas corpus petition*

Mr. Venable was indicted for the first degree murder of Thomas Hicks and other charges growing out of the Hicks homicide. He was also indicted for the crime of assault with intent to commit murder in the first degree, and malicious stabbing of David Lee Chance.[2]

Mr. Venable in his first habeas petition admits he waived his right to trial by jury and submitted the issues to the trial court upon a plea of guilty.

His first petition said:

> "Thereupon, the State placed one witness upon the witness-stand and his testimony was to the effect that he had not seen anything nor knew anything concerning

[2] These facts are alleged in Mr. Venable's first State habeas petition, filed in this case as Exhibit A.

the Murder charge with which the petitioner was charged. . . . The petitioner was then called to the stand by his Court Appointed Attorney (name unknown) from the Public Defender's Office of Davidson County, Tennessee, and asked whether he understood what he was doing when he agreed to the waiver of trial by jury and the right to appeal. This question was answered in the affirmative by petitioner."

(Exhibit A. p. 4)

The trial judge dismissed the petition without an evidentiary hearing. His order noted that on the date of trial in 1966, Mr. Venable had executed a sworn written waiver of a jury trial, a written plea of guilty, and a written waiver of appeal. These documents were made exhibits to his order of dismissal and are reprinted here as follows (found in this case in Exhibit A, pp. 16-18):

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

[fol. 1] DIVISION I

Filed
May 3, 1966
Alma Ridley
D.C.

STATE OF TENNESSEE

VS.

CASTEL VENABLE

MOTION FOR WAIVER OF JURY

Pursuant to the authority granted by Chapter Forty Nine of the Public Acts of 1965, a motion has been seasonably made by the defendant to waive a trial by jury, which motion the Court is pleased to grant.

The defendant makes oath in due form that he has been advised by counsel of the constitutional right of every defendant to a trial by jury, but through this motion, concurred in by the District Attorney General and counsel for the defense, desires to waive said privilege.

/s/ A. A. Birch, Jr.
Attorney for defendant

/s/ Castel Venable
Defendant

/s/ James R. Omer
District Attorney General

Sworn to and subscribed to before me
this 3rd day of May, 1966.

/s/ Alma Ridley D.C.

IN THE CRIMINAL COURT OF DAVIDSON COUNTY

[fol. 1]

Filed
May 3, 1966
Alma Ridley
D.C.

STATE OF TENNESSEE)
)
VS.)
)
CASTEL VENABLE)
Defendant)

PLEAS OF GUILTY

The defendant, appearing in person in this cause, and having been fully advised by the court of the crime charged against him, the punishment which could be meted out if the defendant is found guilty and of his constitutional rights therein, hereby voluntarily pleads guilty to the offense of

Murder, second degree, of Assault with Intent to Commit Murder in 1st degree in two cases.

The defendant also states to the court that his Attorney being present, Honorable A. A. Birch, Jr., has fully informed him of all of his rights and that after a full explanation of these rights, the defendant informed his Attorney that he wanted to voluntarily enter a plea of guilty, and to this decision of the defendant, said Attorney agrees.

This the 3rd day of May, 1966.

/s/ Castel Venable
Defendant

Approved:

/s/ A. A. Birch, Jr.
Attorney for Defendant

IN THE CRIMINAL COURT OF DAVIDSON COUNTY

[fol. 1]

Filed
May 3, 1966
Alma Ridley
D.C.

STATE OF TENNESSEE)
)
VS.)
) Docket No. 19891, 19893, 19899
CASTEL VENABLE)
Defendant)

WAIVER OF APPEAL

Comes the defendant in person and with counsel and states to the court that he was convicted of Murder in second degree and Assault with intent to Commit Murder in first degree in two cases on May 3, 1966, and he does

not desire to appeal his case to the Supreme Court of Tennessee. He states that this decision has been made by him voluntarily after a full and complete discussion of same with his attorney.

The defendant states that he fully understands his right to appeal his case and that he, nevertheless, desires not to appeal. His attorney agrees that defendant has no basis for appeal as there are no errors in the record.

This the 3rd day of May, 1966.

/s/ Castel Venable
Defendant

/s/ A. A. Birch, Jr.
Attorney for Defendant

The plea of guilty was in May, 1966. The first State habeas petition was filed in August, 1967, and said nothing about ineffective assistance of counsel. The trial judge's dismissal, based on the written waivers, was later affirmed in an unreported opinion by the Tennessee Court of Criminal Appeals (Exhibit E).

2. *The second State habeas petition*

Mr. Venable filed his second State habeas corpus petition July 30, 1968. Once again he failed to mention any dissatisfaction with his 1964 attorney. (Exhibit 1, pp. 3-6). Four months later, by counsel, an amended petition was filed, alleging ineffective assistance of counsel. He alleged in pertinent part that his attorney was too busy with other clients to represent him, would not discuss the case with him, never talked to him about the case, was unprepared, and refused to listen to him when he said he wished to withdraw his guilty plea. (Exhibit 1, pp. 13-15).

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On this amended petition, an evidentiary hearing was held. Mr. Venable testified and was cross-examined. He admitted he signed the documents waiving his right to trial, etc., but maintained his plea was entered only because his attorney was so disinterested he had no other choice. (See, transcript of evidentiary hearing, introduced in this proceeding as Exhibit 2). Mr. Venable admitted he had been arrested and appeared in court previously some fifty-six separate times (Exhibit 2, p. 38) including appearances in connection with several felony convictions, although he denied he was familiar with court procedures.

The trial judge, after listening to the testimony at the evidentiary hearing, denied the petition in a written order in which he said, "Furthermore, it is abundantly clear from the record in this case that the defendant by his own motion voluntarily waived his right to trial by jury and that he fully understood the nature of proceedings . . . . This Court finds that Mr. Birch is an able and competent trial attorney at the Nashville Bar and finds that Mr. Birch adequately represented the petitioner throughout the proceedings in this cause." (Exhibit 2, pp. 19-20)

An appeal from this second State habeas proceeding was affirmed by the Tennessee Court of Criminal Appeals (Exhibit 6) with the Tennessee Supreme Court denying certiorari (Exhibit 7).

3. *The federal habeas proceeding*

The federal petition alleged ineffective assistance of counsel "because of the perfunctory appearance by petitioner's court appointed legal counsel at trial." He spelled out in detail the same allegations he had made in his second State habeas action. The petition is reproduced in Appendix C.

The United States District Court for the Middle District of Tennessee dismissed the petition without a hearing and the Sixth Circuit reversed and remanded for a hearing on the issue of the effectiveness of Mr. Venable's attorney.

The Sixth Circuit ignored 28 U.S.C. §2254(d) which provides that "a determination after a hearing on the merits of a factual issue, made by a State court . . ., evidenced by a written finding . . . shall be presumed to be correct, unless [the factfinding procedure was deficient in one of the ways enumerated in that statute]."

It would have been better, in retrospect, had the defense attorney been called to testify.[3] Nevertheless, as Mr. Justice Rehnquist pointed out in dissent in *Loper v. Beto*, 405 U.S. 473, 502:

> "However on the basis of his overall assessment of petitioner's credibility, the trial judge declined to believe these self-serving assertions. The uniform doctrine of the cases, both in this Court and elsewhere, is that the finder of fact is entitled to wholly disbelieve the testimony of an interested witness. *NLRB v. Pittsburg S.S. Co.*, 337 U.S. 656, 659 (1949)."

REASON FOR GRANTING THE WRIT

The Sixth Circuit has decided an important question of federal law which has not been but should be settled by this Court.

What happens in a habeas corpus case when the trier of fact after an evidentiary hearing disbelieves the prisoner, who is the only witness? In the absence of any counter-proof, is the Sixth Circuit correct that there

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[3] No reason is given in the record why he was not called. He is now a judge of the General Sessions Court of Davidson County (Nashville).

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must be a remand for more proof? Should not the Sixth Circuit have accepted the State judge's finding of fact as required by 28 U.S.C. §2254(d), *supra*?

If, for example, the attorney is dead, must the prisoner be released because the State can produce no rebuttal testimony? What is the effect, in such a case as this, where the prisoner waited years before he voiced his claim and where the trier of fact found his account unbelievable?

The State argues the trial judge had the option of disbelieving Mr. Venable because:

a) he waited several years to complain about his attorney

b) the trial judge found the attorney to be a man of good repute at the bar

c) the trial judge had the opportunity to observe the demeanor of Mr. Venable when he testified

d) Mr. Venable's story that he plead guilty only because his attorney was so incompetent he thought he had no other option is contradicted by Mr. Venable's other testimony at the time the plea was taken wherein he confessed his guilt, signed sworn documents about his guilt, etc.

If it was true that the lawyer wouldn't talk to Mr. Venable, wouldn't subpoena any witnesses or investigate the case, why didn't Mr. Venable make this known to the judge when he plead guilty? He should not be allowed to come up years later and have his guilty plea set aside after he confessed his guilt in open court. The case squarely presents the issue whether the trial judge may wholly disbelieve the testimony of the petitioner where he is an interested witness and where he has previously sworn in a contrary fashion.

The Chief Justice recently emphasized the importance of plea bargaining as an essential component of the administration of justice in *Santobello v. New York*, 404 U.S. 257, 260-261 (1971). Mr. Justice Douglas in his concurring opinion traces this Court's historical concern that a guilty plea be made freely, voluntarily, and intelligently. *Id.*, at 264-266. The petitioner is in full accord. In the present case, the waiver of these fundamental rights *does* appear in the record. The prisoner is trying to go behind his own waiver.

The case presents an opportunity for the Court to give direction to lower courts on an important question of constitutional law as to what extent a prisoner may repudiate a waiver he has made on the record.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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[fol. 1]

APPENDIX A

NO. 71-1593

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CASTEL VENABLE,

v.

WILLIAM S. NEIL,

On Appeal From the United States District Court for the Middle District of Tennessee

Decided and Filed June 30, 1972.

Before: McCREE and KENT, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

PER CURIAM. This is an appeal from an order denying a petition for a writ of habeas corpus attacking the constitutional validity of petitioner's conviction on his plea of guilty to second degree murder. Although two contentions were asserted, only one presents an issue cognizable in this proceeding: that petitioner was denied the effective assistance of counsel appointed to represent him in the state criminal proceedings. He has exhausted available state remedies.

The District Judge stated that petitioner would be entitled to an evidentiary hearing before him on his allegations of ineffective assistance but for the fact that he was not prejudiced thereby because petitioner, by his own statement at the state court post-conviction hearing, was guilty of at least second degree murder for which he received the

minimum sentence (10 years) which could lawfully be imposed. The District Judge made no reference [fol. 2] to the relationship between the alleged ineffective assistance and two charges of assault with intent to commit murder to which a plea of guilty was also accepted and for which concurrent 3 year sentences to begin after expiration of the murder sentence were imposed.

We have examined the transcript of the state post-conviction proceeding upon which the District Court based its findings, and we observe that assigned trial counsel did not testify. Recognizing that predicting the outcome of criminal trials is at best an uncertain undertaking, we conclude that petitioner may have, with the assistance of counsel, presented an effective self-defense plea at trial. He testified that the victim had cut his throat eight months before the fatal shooting, had threatened his life more than once, and that petitioner shot the victim only because he was going for his knife. The uncontradicted testimony of petitioner is that his appointed attorney spoke to him for only ten minutes and refused to listen to his version of the shooting or to investigate the surrounding circumstances. The serious default of counsel alleged here was not cured when his guilty plea was accepted because he testified that his efforts to explain that counsel's infidelity compelled it were frustrated. *Cf. McMann v. Richardson*, 397 U.S. 759 (1970).

We cannot determine from this record whether petitioner's version of his relationship with his counsel is accurate. If it is, he has been denied a constitutional right. Accordingly, we reverse and remand for an evidentiary hearing with the assistance of counsel and for a determination whether appellant is entitled to habeas corpus relief.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

[fol. 1]

Received for Entry
3:00 P.M.
May 25, 1971
Brandon Lewis, Clerk
By /s/ K. W. Morgan, D.C

CASTEL VENABLE

VS.

WELDON W. COX, Acting Warden, Tennessee State Penitentiary

Civil No. 5837

ORDER

This court takes judicial notice of the fact that Weldon W. Cox is presently Acting Warden of the Tennessee State Penitentiary and that, as such, he holds the petitioner in custody. Accordingly, it is ORDERED that he be substituted as respondent herein.

Petitioner filed a petition for the writ of habeas corpus in which he set forth two grounds upon which he based his contention that his incarceration was illegal. The first of these grounds, which need not be set forth herein, was summarily rejected by this court because the factual allegations upon which it was based did not show any violation of petitioner's federally-protected rights. The
[fol. 2] second ground was that he was denied the effective assistance of counsel in the course of his State criminal proceedings. With regard to this latter ground, this court, in an order entered July 28, 1970, stated that "[t]he factual allegations here are vague, but,

since he asserts that he has presented these questions to the State courts and has exhausted his available State remedies . . . , this court is of the opinion that an order to show cause should issue, directing the respondent to reply to these allegations of the petition. In the event an evidentiary hearing was had in the State court, it is requested that a transcript of such hearing be attached to the answer of respondent."

The ordered response has now been forthcoming, and it consists, *inter alia*, not only of the aforementioned transcript, but also of the briefs of counsel and the opinions rendered in petitioner's two State post-conviction relief proceedings. In the opinion of the court, the response makes it clear that the relief petitioner has requested must be denied.

Briefly stated, petitioner's allegations are as follows: He was indicted for several violent crimes, including first degree murder, and an assistant public defender was appointed to represent him. Upon learning of the appointment, petitioner was taken into an anteroom of the courthouse to confer with his attorney. The attorney, however, had also been appointed to represent some fifteen other defendants, all of whom were present in the anteroom,

[fol. 3] and was consequently too busy to confer with petitioner. Petitioner did not see the attorney again until the night before he was scheduled to go on trial, at which time the attorney visited him in the county jail. This conference lasted only some ten minutes, however, and culminated with the attorney advising petitioner to plead guilty: he refused to listen to the facts surrounding the events which gave rise to petitioner's indictment or otherwise to prepare for trial. Instead of permitting petitioner to state his version of the case, he cut him off with the assertion that he had no defense. The

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following day—trial day—the case was passed and reset (it is unclear at whose behest), because petitioner was dissatisfied with his counsel. Petitioner was returned to jail, where he remained, under the assumption that another lawyer would be appointed. When new counsel failed to appear, petitioner assumed he was not represented by anyone and took it upon himself, by way of a letter to the prosecuting attorney, to bargain for a plea. Apparently, an agreement was reached, for, when the trial date arrived, petitioner waived his right to trial by jury and his right to appeal and entered a plea of guilty to a charge of *second* degree murder. The waiver forms were provided him by his original court-appointed attorney, and this marked the first time he had seen that attorney since the case had been reset. The substance of petitioner's position is that, upon the basis of the foregoing sequence of events, his court-appointed [fol. 4] counsel did not represent him with the zeal and vigor which is required by the Sixth Amendment. Hence, he contends, his sentence should be set aside.

This court feels that petitioner has stated his case so strongly that he would be entitled to a hearing on his petition if it were not for one factor: assuming, *arguendo*, that petitioner was not, in fact, effectively represented by his court-appointed attorney, it is abundantly clear, from his own testimony, in the State court hearing, as to the events which gave rise to his murder charge, that petitioner was in no conceivable way prejudiced by such lack of representation. More specifically, petitioner freely admits the acts upon which he was charged. He contends, however, that the defense of self-defense was available, if his attorney had only sought to take advantage of it. Nevertheless, in his State hearing, he described repeatedly and in detail (as evidenced by the

transcript made a part of the record in this case) the events leading up to and surrounding those acts, and it is obvious *from petitioner's own testimony* that, under the law of Tennessee (of which this court can, of course, take judicial notice), he was guilty of *at least* second degree murder—the charge to which he ultimately pled guilty. It is further obvious that, pursuant to T.C.A. § 39-2408, he received the very minimum sentence which can be imposed for that offense.

[fol. 5] While the guilt or innocence of a habeas corpus petitioner are not in themselves relevant in determining whether the petition should be granted or denied, it is crucial in the instant case to note that, as a matter of law, *nothing* could have been done by petitioner's court-appointed attorney that would have left petitioner in a better position, in terms of his conviction and sentence, than he, himself, attained as a result of his plea-bargaining efforts. The Court of Criminal Appeals of Tennessee, in ruling on petitioner's State petition, stated that he ". . . failed to show that he was prejudiced by the representation of counsel or lack of conferences with him." Venable v. State (filed February 3, 1970). This court is of the opinion that, for the reasons set forth above, that decision falls within the ambit of 28 U.S.C. § 2254(d) and, consequently, must be presumed to be correct. Accordingly, the instant petition must be DENIED. It is so ORDERED.

/s/ Frank Gray, Jr.
UNITED STATES DISTRICT JUDGE

Attest: A true copy
Brandon Lewis, Clerk
U. S. District Court
Middle District of Tennessee
By: /s/ Kathryn W. Morgan, D.C.

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APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
CIVIL ACTION NO. 5837

[fol. 1]

FILED
July 28, 1970
Brandon Lewis, Clerk
By /s/ L. M. Edwards, D.C.

CASTEL VENABLE
PETITIONER

VS.

WILLIAM S. NEIL, WARDEN
TENNESSEE STATE PRISON
NASHVILLE, TENNESSEE
RESPONDENT

JURISDICTION OF THE COURT TO ENTERTAIN THIS PETITION LIES UNDER TITLE 28, U.S.C.A., SECTION 2241 (3).

PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Castel Venable, petitions the Court for a writ of habeas corpus upon the following grounds:

1.

The petitioner was indicted by the Grand Jury of Davidson County, Tennessee for the offense of first degree murder. Upon trial of the indictment, May 3, 1966, the petitioner waived his right to trial by jury and entered a plea of guilty to second degree murder and was sentenced to serve 10 years in the State penitentiary.

2.

Petitioner contends that his constitutional rights were violated by the following prosecutorial procedure.

(A) That the trial judge had no jurisdiction to grant a waiver of jury trial for the offense of first degree murder or second degree murder. T.C.A., section 39-2404, Section 39-2404 is a special statute setting out the procedure to be followed in first or second degree murder cases. The provisions of this statute is not waivable by the accused, his attorney, or the trial court. Therefore the waiver of trial by jury is void. Section 39-2404 clearly provides that the jury must determine the degree and shall ascertain in their verdict whether it is first or second degree murder. Furthermore, this statute provides that if the accused confess his guilt the

[fol. 2] court shall proceed to *determine the degree of crime by the verdict of a jury*, upon examination of testimony and give sentence accordingly.

Section 39-2404 is a special statute and was not repealed by the enactment of T.C.A., Section 40-2504. It is hornbook law that the provisions of a general statute does not repeal by implication the provisions of a special statute such as section 39-2404. Section 39-2404 is a special statute providing guidelines for the court to follow in homicide cases. The procedure of the trial judge permitting the petitioner to waive trial by jury not only violated the provisions of section 39-2404, but invaded the province of the jury to assess the punishment and to determine the degree of homicide as shown by the evidence.

The trial judge committed prejudicial error in permitting the petitioner to waive his constitutional right to trial by jury, and the trial judge's action violated the mandatory provisions of Article 6, section 9, Constitution of Tennessee. This constitutional mandate is very clear in providing that the trial judge shall charge the jury with respect to matters of law.

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Appendix C

Under Tennessee Criminal Procedure the jury has the right to determine the degree of homicide as shown by the evidence, and the jury has the constitutional right to return a verdict of manslaughter or 2nd degree murder although the accused pleaded guilty to first degree murder. The Supreme Court of Tennessee held in Thomas vs. State, 210 Tenn. 297, 358 S.W. 2d 315:

"It is the duty of the jury to fix the degree of homicide shown by the facts."

The waiver of jury trial also violated Article 1, section 6, section 8, Constitution of Tennessee.

The Courts of Tennessee are construing T.C.A., section 40-2504 to cover the waiver of jury trials in homicide cases thereby depriving accused persons of the equal protection of laws guaranteed every criminal defendant under the provisions of the 14th Amendment to the United States Constitution.

[Vol. 3] "If all persons are treated alike under the law and under the same circumstances, no person can be said to be deprived of equal protection of the laws."

In Re Converse, 137 U.S. 624;
Caldwell vs. Texas, 11 S. Ct. 224;
Leeper vs. Texas, 11 S. Ct. 577.

The 14th Amendment to the Constitution of the United States prohibits the States from denying to any person within their jurisdiction the equal protection of the law. United States vs. Cruikshank, 92 U.S. 542, 23 L. Ed. 588.

Appendix C

3.

PETITIONER WAS DENIED A FAIR TRIAL WITH DUE PROCESS OF LAW AND WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE OF THE PERFUNCTORY APPEARANCE BY PETITIONER'S COURT APPOINTED LEGAL COUNSEL AT TRIAL.

Petitioner contends that he was deprived of his right to counsel as embodied in the Sixth Amendment to the Constitution of the United States and Article 1, Section 9, Constitution of the State of Tennessee. On the day he was arraigned, the Court appointed an assistant public defender to defend him. This same public defender had 15 or 20 other persons to represent charged with crimes. This appointed counsel could not possibly prepare an adequate defense for petitioner when he was burdened with so many other cases to prepare for trial. As a result petitioner was informed by appointed counsel that it would be impossible to discuss his case and that consultation and preparation would have to be postponed to a later date. On the evening before the petitioner's trial his appointed counsel appeared before him and then his appearance was only very brief and without value. Court appointed counsel informed petitioner that he was without a defense and departed.

Appointed counsel never made a thorough investigation of the facts of the case, never discussed the case with petitioner or tried to find out any mitigating circumstances which might give rise to a potential defense. After finding out that appointed counsel had made no effort to prepare for trial the petitioner sought and obtained a delay of his trial. In the meantime the appointed counsel had approached the District Attorney concerning some kind of agreement, and the petitioner was advised that for a plea

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of guilty the District Attorney would recommend
[fol. 4] a sentence of 25 years on two offenses, murder in the first degree and assault with intent to commit first degree murder. Court appointed counsel strongly insisted that petitioner accept this arrangement but petitioner refused.

Awaiting the second trial petitioner wrote the Attorney General and received a proposal of sixteen years imprisonment on three offenses mentioned with three years running concurrently. After considering all the factors involved, that he did not have attorney who would give his undivided attention to his cause agreed to accept the Attorney General's proposal and plead guilty.

Upon the trial petitioner requested that his court appointed counsel withdraw the guilty plea but counsel refused to even consider his request.

The petitioner is a man of very little education and totally lacks any training or experience in legal matters. He was financially unable to employ counsel of his own choosing. He had to depend on appointed counsel to render whatever assistance he wanted to. Because of the prevailing conditions herein referred to, the demands on the time of his court appointed legal counsel, the lack of investigation and preparedness on the part of appointed counsel, and the lack of individual and personal attention by his appointed counsel which the case required, the petitioner was deprived of the effective assistance of counsel for his defense in violation of the Sixth Amendment to the Constitution of the United States.

A man accused of a capital offense is entitled under the Sixth Amendment to the United States Constitution to the effective assistance of counsel for his defense. Powell

vs. Alabama, 287 U.S. 45; Gideon vs. Wainwright, 372 U.S. 335; Schaber vs. Maxwell, 348 F.2d 664 (6 Cir.).

To be effectively represented by counsel, whether court appointed or employed, counsel must devote time sufficient to insure an adequate defense to the charge. Doughty vs. Beto, 396 F.2d 128. A trial without adequate preparation by counsel is tantamount to no trial at all. Brooks vs. Texas, 381 F.2d 619. The first element in preparation for a trial is the investigation of the case, interview with witnesses, full consultation with the accused, and a determination of policy to be followed during the trial. All of these elements were missing in the preparation of petitioner's trial by court appointed counsel. This constituted ineffective assistance of counsel and destroyed the essential integrity of the trial which deprived petitioner of his right to a fair, impartial, and constitutional trial.

[fol. 5]

An attorney who undertakes the defense of a person accused of crime has the obligation and the affirmative duty to conduct an active investigation of his client's case. Jones vs. Cunningham, 313 F.2d 345; Brubaker vs. Dickson, 310 F.2d 30.

> "Of course, it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist. Such a duty is imposed for the salutary reason that "prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what pleas shall be entered."

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Appendix C

Von Moltke vs. Gilles, 332 U.S. 708, 68 S. Ct. 316.

A more specific case is the case handed down by the 4th Circuit as to the duties of counsel before trial. Coles vs. Peyton, 389 F.2d 2234-2236.

"Counsel should be afforded a reasonable opportunity to defend an accused. Counsel must confer with his client without undue delay and as often as necessary to advise him of the rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial. An omission or failure to abide by these requirements constitutes a denial of effective representation of counsel unless the state on which the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.

4.

Petitioner has exhausted the remedies available to him in the Courts of Tennessee by obtaining a decision on the same constitutional questions presented herein in the Davidson County Criminal Court, the Court of Criminal Appeals, and certiorari being denied by the State Supreme Court. Section 2254, Title 28, U.S.C.A., has been complied with.

[fol. 6]

5.

Petitioner being indigent and unable to employ counsel asks the Court to appoint counsel to represent him in this action before the court.

Premises considered, petitioner prays that the petition for writ of habeas corpus be granted, and that after hearing the proof that an order be entered voiding the conviction entered herein.

Respectfully submitted,

/s/ Castel Venable
Castel Venable - petitioner

[Verification and Affidavit of Poverty
(Omitted in Printing)]